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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALASKA NORTHERN DEVELOPMENT INC.
AN ALASKAN CORPORATION, *Petitioner*,

v.

ALYESKA PIPELINE SERVICE COMPANY,
A DELAWARE CORPORATION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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October, 1983

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Alaskan courts' refusal to accept proffered evidence of an alleged Alyeska tariff-manipulation conspiracy deprived the petitioner of a trial on the merits and prevented proof of violations of the Federal Energy Policy and Conservation Act, thereby resulting, in the loss of possibly billions of federal and state revenues and continued higher energy prices for American consumers?

2. Whether by failing to follow a controlling decision of this Court and one of its own, the Alaska Supreme Court deprived petitioner of its right to a jury trial guaranteed by both State and U.S. Constitutions?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

OPINIONS BELOW

The opinion of the Superior Court is not published. The opinion of the Alaska Supreme Court has been published in the official reporter and it is cited as *Alaskan Northern Development, Inc., an Alaskan Corporation, Appellant, v. Alyeska Pipeline Service Company, a Delaware Corporation, Appellee. (No. 6353)* 666 P. 2d 33 (Alaska 1983).

JURISDICTION OF THIS COURT

This is an appeal from a decision of the Alaska Supreme Court affirming summary judgment to Alyeska Pipeline Service Company in a contract dispute over the sale of surplus parts and tools valued up to $400 million dollars. The trial judge first granted summary judgment to Alyeska on the contract claims of Petitioner's (plaintiffs below) but sua sponte ordered a trial on the issue of reformation of the contract. The petitioner challenged these rulings contending they deprived it of (1) an opportunity to prove a cost-manipulation conspiracy scheme which violated a federal statute and (2) of petitioner's constitutionally-protected right to a jury trial. This challenge was rejected by the Alaska Supreme Court in its judgment and decision issued on June 10, 1983; rehearing was denied on July 19, 1983. This petition for certiorari was timely filed within 90 days from that date.

This court has jurisdiction under 28 U.S.C. §1257 (3) to grant certiorari.

CONSTITUTION PROVISIONS AND STATUTES

The petitioner contends that the court's decision and judgment below offend the Seventh Amendment to the United States Constitution and Article 1, Section 16, of the Alaska State Constitution. In addition, it also contends that Alyeska's tariff-manipulation conspiracy scheme violates Section 401 of the Federal Energy Policy and Conservation Act of 1975 and have national application and significance. All these provisions are set forth in the appendix.

STATEMENT OF THE CASE

I. Factual and Procedural Background

The Alaskan Pipeline was completed in the fall of 1976. Oil started to flow in June of 1977. The pipeline project, costing $9 billion dollars, was the largest non-government venture ever undertaken by man.

In the fall of 1976 it was evident that, as construction wound down, Alyeska Pipeline Company would have to dispose of enormous quantities of surplus equipment, parts and tools. In its February 1977 employee publication, Alyeska said, "the purchase value of goods expected to be declared to be surplus amounts to approximately $800 million." Of this amount, between $120 million and $400 million were new spare parts and tools. A more accurate estimate of spare parts and tools was not obtained because Alyeska thereafter deliberately destroyed inventory records.

Petitioner, Alaska Northern Development, Inc., is a small Alaska business corporation. Alyeska Pipeline Company is a quasi-public non-profit Delaware corporation. It has been delegated condemnation and declaration-of-taking power under Alaska's Rite-of-Way Lands Leasing Act. It is owned by a consortium of eight major oil companies. These entities built and operate the Alaska Pipeline. The line transports 1.6 million barrels of oil each day from the Alaska North Slope 869 miles to the port city of Valdez.

In December of 1976, following extensive negotiations between Mr. William Rickett, Alyeska's Manager of contracts and materials, his staff and petitioner's President, Mr. David Reed, an agreement was reached for the sale of all Alyeska's spare parts and tools.

The agreement, in the form of a "letter of intent" dated December 11, 1976 was signed by Mr. Rickett personally. (Appendix B). Letters of intent were commonly used by Alyeska, and as a matter of policy were considered binding contracts.

Mr. Rickett, in behalf of Alyeska, essentially granted the

petitioner the first right of refusal to purchase the pipeline project's entire inventory of spare parts and tools worth between $120 to $400 million.

Mr. Rickett, on his own initiative, without any prior consultation with his staff, inserted an additional sentence in the first paragraph of the letter. It stated that the letter is "subject to the final approval of the owner committee." Mr. Rickett testified he personally inserted this clause for the sole purpose of enabling the owner committee to review the contract as to "price only." Mr. Reed agreed with this interpretation.

This term turned out the cause of the litigation.

Between December, 1976 and March, 1977, petitioner and Alyeska commenced performance under the agreement; the petitioner by obtaining $100,000,000 of guaranteed funding in Australia and forming a consortium to handle surplus sales and Alyeska by readying $10 million dollars of "Gate 21" spare parts for delivery to petitioner.

In February and early March of 1977, the Alyeska owner committee met. It disapproved the December 11 agreement. No reasons were given. Within a few days Alyeska summarily fired Mr. Rickett without notice or giving any reasons. Up until this abrupt discharge, Mr. Rickett was characterized by his colleagues as a fair, honest person and effective manager. He had advanced to the highest echelon of management in Alyeska's organization. Within Alyeska, his 1976 budget exceeded $2 billion dollars and he supervised a staff of 2500 persons.

In April of 1977 petitioner filed suit in the Superior Court alleging that the December 11 letter was a contract and Alyeska breached it. The complaint was later amended to include counts for punitive damages and reformation.

In October 1977, Alyeska initially moved for summary judgment. It argued the "subject to owner committee approval" clause gave Alyeska owner committee an unfettered right of veto over the December 11 letter of intent.

In January of 1978, the trial court denied this motion.

In January 1980, the petitioner then filed its motion for partial summary judgment. It contended there was an agreement and Mr. Rickett had authority to negotiate for Alyeska. Alyeska opposed the motion essentially on the grounds that Mr. Rickett lacked authority to bind Alyeska and that the "subject to" clause gave the owner committee veto power over the agreement, if any, and they exercised it.

In March of 1980, after considering all depositions, affidavits, and arguments of counsel, the trial court granted petitioner's motion for partial summary judgement on these grounds: (1) The "parties did have a contract"; (2) "Rickett had authority to enter into the contract"; (3) "that a review of Rickett's deposition and Reed's deposition - support a finding - they intended - to qualify - that approval."

In September of 1980 the trial court, *sua sponte*, reversed itself and set aside petitioner's March 1980 partial summary judgment. It simultaneously resurrected and granted Alyeska's previously denied motion for summary judgment.

The Court's reasons for its 180 degree reversal of position were (1) the parol evidence rule in Section 2-202 of the Uniform Commercial Code (Alaska Statutes 45.022.02) precluded extrinsic evidence to a jury which would limit the owner's committee power to veto the December 11 letter; (2) the December 11 letter was partially integrated because the parties who negotiated the terms of the letter intended the "subject to" language to be a final expression of owner committee authority."

The petitioner argued that this new finding that the parties, (Rickett and Reed), who negotiated the December 11 letter, intended the "subject to" language to give the owner committee veto power over the letter, flew squarely in the face of Rickett's sworn testimony that: (1) Without staff input, he

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[1*] At fn7 at 666 P. 2d 41, in its opinion below, the Supreme Court refused to consider petitioner's UCC Sec. 2-207 argument. The Court assumed the 2-207 argument was "never raised at the Superior Court level." The fact is that 2-207 was raised but dismissed as irrelevant see pp 41-42 of petitioner's 12/22/80 trial brief.

personally wrote in the "subject to" language; (2) he intended that language to enable the owner committee to review as "price only"; (3) that Mr. Reed also understood the language to mean exactly as Rickett understood.

Petitioner further argued for the trial judge to find that the negotiators shared a mutual and consistent intention, yet to hold that intention cannot be proved is more than irony—it is ignorance of uncontroverted facts.

II. Reformation Trial Over Objections

Despite these arguments and over petitioner's strenuous objections, a non-jury reformation trial commenced. The trial judge ruled that the trial would be restricted to the single equitable issue presented, i.e., what was the intent of the negotiators of the agreement between the parties in using the rather broad language of the "subject to" and "first right of refusal/price" clauses set forth in the December 11, 1976 letter of intent?

It was at this stage in the proceedings—after the trial judge granted Alyeska summary judgment and concurrently decided it would conduct a reformation trial without a jury—that the deprivation of petitioner's constitutional right to a jury trial was promptly raised (TR 5431-47).

In January of 1981 a non-jury reformation trial commenced. The trial judge opened "Pandora's box". It received six weeks of detailed evidence on the contract formation issue. Then using a higher standard of proof i.e. the "clearly erroneous" standard, it ruled petitioner was not entitled to have the December 11 agreement reformed to include the "price only" term in the "subject to" clause. He thereupon reaffirmed Alyeska's previously-granted summary judgment, made findings on contract formation and awarded Alyeska $463,000.00 in attorney fees. Alyeska's counsel described this law suit as, "one of the most extensively litigated cases in Alaska's history".

A. What was the evidence on the tariff-manipulation issue?

During the course of the reformation trial, the court refused petitioner's offer of tariff-manipulation conspiracy evidence. This evidence would have disclosed the real reason for Alyeska's otherwise inexplicable veto of petitioner's lucrative offer to pay 65 cents on a dollar for Alyeska's inventory for surplus parts versus its ultimate 13.1 cents on a dollar recovery.

The court refused to consider evidence of the following facts: (1) that neither Mr. Rickett or his superior, Mr. George Nelson, Alyeska's vice president, knew at the time of the December 11 letter that it favored Alyeska's economic self interest to lose rather than make money on the sale of spare parts and thereby increased tariff-base costs; (2) at a January 1977 meeting, Mr. Nelson showed the December 11 letter to Mr. Brelsford, Alyeska House counsel and was advised there was a binding deal and the letter was a legal contract; (3) that between December 1976 and March 1977 both parties commenced performance of the December 11 agreement; (4) during either their February or March 1977 meeting, the owner committee, without giving any reasons, vetoed the lucrative December 11 agreement; (5) following the veto, Alyeska recovered only 13.1 cents on the dollar from surplus sales; (6) the Federal Energy Regulatory Commission utilized "cost"as a tariff base under Section 401 of the Federal Energy Policy and Conservation Act of 1975, 89 STAT 941-46; (7) that the pipeline tariff "directly impacts" the well-head price of oil under Section 401. Well-head prices are determined by subtracting pipeline and tanker transportation costs from the market price of the oil; (8) under that formula, for every $10 million dollars of extra costs, Alyeska would recover not only its $10 million but an additional $6 million in profits. In other words, Alyeska was guaranteed a 160% return, based on its costs to construct the pipeline; (9) the FERC tariff formula permitted Alyeska to utilize borrowed money instead of equity to construct the pipeline. The cost of such borrowed money with an investment profit thereon of 9 to 10% was included in the tariff base; (10) that for every five cent increase in the

pipeline tariff, the taxing authorities lose one cent per barrel in taxes and royalties. Put differently, each $16 million dollar reduction in pipeline costs resulting from surplus sale revenues, would have reduced transportation charges by one cent per barrel; (11) the Federal and State governments, due to the higher tariff costs, lose countless millions of dollars in excess profit taxes and royalties while American consumers continue to pay higher fuel oil and gasoline prices: (12) management employees of Alyeska testified they observed the purposeful destruction and burying of brand new parts and tools along with inventory records of the same along the entire pipeline right-of-way.

The trial court ruled that none of the above evidence was admissable absent a "smoking gun" e.g., "in the form of direct (circumstantial not permitted) evidence showing petitioner was the 'direct' victim of the conspiracy."[*] This exclusionary ruling deprived petitioner of an opportunity to expose Alyeska's tariff-manipulation conspiracy as a violation of Section 401 of the Federal and Energy Conservation Act of 1975 and hence the real reason why—in bad faith—it rejected petitioner's lucrative December 11 agreement in favor of a scheme to lose as much money as possible on surplus sales. (TR 4142, 4155)

In this context the trial court also prohibited petitioner's counsel to cross examine Mr. Nelson in order to impeach his credibility on the issue of when he first knew of the December 11 letter. He earlier testified he did not know of its existence until February of 1977. Petitioner argued that, based on the testimony of Mr. Rickett, he personally met with Mr. Nelson, Miller and Patterson, in late December 1976 and that a Mr.

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[*] The Supreme Court at 666 P. 2d 41 in its opinion stated that petitioner did not point to any evidence that would give rise to an "inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice." It is submitted that the above tender of proof in fact constitutes ample circumstantial evidence of such outrageous conduct. It should at least have been submitted to a jury. It sould be also noted that the Alaska Supreme Court incredulously ruled that the reformation trial—which trial proceeded over petitioner's strong objections—was frivolous. It then approved a $463,000 assessment of attorney's fees against petitioner. 666 P. 2d at 42.

Selihment, a member of Mr. Rickett's staff, who was phoned by Mr. Nelson in early January of 1977 to ask if he knew of the December 11 letter, that cross examination to clarify this inconsistency should have been permitted. The trial court refused. The trial court's reason for so restricting cross examination was because that to fully examine Mr. Nelson would require exploration into the underlying conspiracy theory. That absent "smoking gun" evidence of a conspiracy, such cross examination would cause undue delay, a waste of court time and allow a "side show to swallow up the circus."

B. Reformation Findings Were Both Legal and Equitable

In its reformation trial findings, the trial court strayed far-field. It made findings not only on the equitable issue of reformation but also findings on the legal issue of contract formation i.e. (1) the parties did not reach an oral agreement; (2) the December 10 and 11 letters were integrated as to price; (3) there was no consideration to support the December 11, 1976 letter and; (4) made other findings of fact pertaining to events occurring between December 1976 and March 1977.

The Alaska Supreme Court affirmed all the above rulings.

THE QUESTIONS ARE SUBSTANTIAL

I. The Tariff-Manipulation Conspiracy Has National Implications

If this Court, unlike the Alaska courts, would penetrate the substance of Alyeska's tariff-manipulation conspiracy scheme, this litigation takes on national significance.

Artificially inflated pipeline costs not only contravene the provisions of Section 401 of the Federal Energy Policy and Conservation Act and Section 130 of the Alaska Pipeline Commission Act, but also are depriving the federal and state government of countless millions and possibly billions of dollars in tax revenues. In addition, American consumers are being saddled with higher oil and gasoline prices. A review will enable this court to determine why Alyeska and its consortium part-

ners, in the context of depriving the petitioner of its December 11 bargain, vetoed the opportunity of recovering 65 cents instead of 13.1 cents per dollar value on its approximate $400 million dollar spare parts and tool inventory.

In this case the Alaska Supreme Court apparently concluded the tariff-manipulation conspiracy issue was not important or relevant. It did this by approving the trial court's ruling that only if petitioner tendered direct "smoking gun" evidence of a conspiracy (circumstantial proof thereof was explicitly disallowed) would such evidence be received.

The fact is petitioner had explicit deposition evidence that (1) gave rise to an inference of outrageous conduct and (2) that petitioner was in fact the target of said conspiracy.

Petitioner argued fruitlessly that the tendered tariff-manipulation evidence also supported its claim for punitive damages. Such evidence gave rise to an inference of conduct so outrageous that one could infer malice and hence came within the holding of *Alyeska Pipeline Service Company v. O'Kelley*. 645 P. 2d at 774 (Alaska 1982) and *Bridges v. Alaska Housing Authority* 375 P. 2d 692, 702 (Alaska 1962).

Yet the trial judge refused to hear it. Instead he granted Alyeska summary judgment and thereby dismissed petitioner's claim for punitive damages.

Section 601 of the *Alaska Rule of Evidence* and the Alaska Supreme Court's holding in *Hutchings v. State 518 P. 2d 767, 768 (Alaska 1974)* mandate that bias and credibility of a witness is always a material issue. Despite these authorities the trial judge steadfastly refused to receive tariff-manipulation evidence even for that limited purpose.

The court's refusal to receive and consider tariff conspiracy evidence effectively destroyed petitioner's case. More seriously, it impliedly approved Alyeska's mammoth tariff-manipulation fraud on American consumers and taxpayers. To be able to offer this evidence to a jury and have Alyeska try to explain it, is essentially what petitioner is requesting this court to do in granting certiorari.

II. Refusal to Follow Controlling Decisions Resulted in Violation of Constitutional Right to Jury Trial

The Alaska Supreme Court's decision below is inconsistent with this court's holding in *Beacon Theatres v. Westover*, 359 U.S. 500, (1959) and with its own decision in *Shope v. Sims*, 658 P. 2d 1336 (Alaska 1983). In so ruling it deprived the petitioner of one of the most valuable rights an American citizen has, its right to a jury trial.

This court in *Dimick v. Schiedt* 293 U.S. 474 (1938) described a citizen's right to a jury trial in this manner: "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of that right should be scrutinized with the utmost care."

The Alaska Supreme Court earlier said once a trial judge determines there are disputed issues of fact (such as the trial judge herein did when it granted petitioner summary judgement in March of 1980), a jury must resolve those issues on the basis of extrinsic evidence. *Hausum v. Wodrich* 575 P. 2d 805, 809. (Alaska 1978).

In Wright and Miller, *Federal Practice and Procedure*, §2338, the authors state that a prior determination of equitable issues would destroy the right to a jury trial because the trial court's decision on equitable issues would control a resolution of the legal issues.

Prior to its decision, in *Shope v. Sims, supra*, the Alaska Supreme Court had not yet decided what the order of trial should be where legal and equitable issues are so interwoven that a determination of one will affect the determination of the other.

However, in *Shope v. Sims*, the Alaska Supreme Court explicitly agreed to follow this Court's decision and its reasoning in *Beacon Theatres*. Whether or not the Seventh Amendment is made applicable in full against the States by the Fourteenth Amendment, where a State construes its constitution in accordance with the federal constitution this Court will

analyze the result to assure conformity with federal quarantees. *South Dakota* v. *Neville*, ____ U.S. ____, 51 L. W. 4148, 4149, n.5 (1983). *Beacon* clearly held that when a case involved both legal and equitable claims, facts common to such claims must be *first tried to a jury* if a proper demand is made.

In *Shope* at 758 P. 2d at page 1340, the Alaska Supreme Court embraced *Beacon* in this fashion: "By implying that the plaintiffs could maintain an ejectment claim only after they prevailed in the equitable claims, the superior court was essentially requiring equitable claims to be tried first—*Beacon Theatres*, which addressed federal procedure and the federal right to a jury trial, held that when a case involves both legal and equitable claims, the facts common to such claims must be tried to a jury if a proper claim is made. We adopt the reasoning in *Beacon Theatres* in interpreting Article I, Section 16 of the Alaska Constitution. Whether a valid location was made involved facts common to both the legal and equitable issues in this case. Therefore the rule in *Beacon Theatres* requires the ejectment claim to be tried *before* the equitable claim." (emphasis supplied)

In its decision below, at 666 P. 2d at P. 41, the Alaska Supreme Court endeavored to distinguish the reformation trial below from *Beacon* in this fashion: *"Beacon Theatres"* does not apply in this case because the trial did not involve both legal and equitable claims". The fact is that the trial court without a jury, considered and resolved both legal and equitable issues. The trial judge labeled[3*] the "equitable issue" as the claim for reformation i.e., what the negotiators intended when Mr. Rickett inserted the "subject to" clause. (Petitioner argued below this issue was jury triable only). The "legal issues" involved contract formation and consideration therefor.

It is undisputed that the trial judge, after completion of

[3*] However, in *Dairy Queen v. Wood*, 369 U.S. 469 (1962), this court was not persuaded by a trial judge's label on an issue. This court, in construing *Beacon Theatres*, as guaranteeing a jury trial first when legal and equitable issues are present, said: "that holding of course, applies whether the trial judge chooses to characterize the legal issues presented as "incidental" to equitable issues or not."

its January 1981 equity trial made jury-type findings of fact on contract formation and alleged lack of consideration for the December 11 agreement. He then retroactively boot-strapped these findings to support its earlier September 1980 summary judgment to Alyeska. This cannot be done without violating Petitioners constitutional right to a jury trial. Summary judgment can be granted only on the basis of uncontradicted evidence then before the trial judge *at the time of his decision.* *Braund v. White,* 486 P. 2d, 50, 53-54 (Alaska 1971).

These actions of the trial judge deprived petitioner of its constitutional right to a jury trial.

CONCLUSIONS

This appeal, from a grant of summary judgment to Alyeska, presents serious constitutional and federal issues involving:

I. Evidence of a tariff-manipulation conspiracy which, if proven, would show: (a) why Alyeska breached a lucrative multi-million dollar agreement and thereby deprived petitioner of its bargain: (b) that Alyeska violated section 401 of the Federal Energy Policy and Conservation Act resulting in the loss of countless millions of dollars in federal and state taxes and higher energy costs for all American consumers.

II. By misunderstanding and failing to follow a controlling decision of this Court, the Alaska Supreme Court deprived petitioner of its right to a jury trial under the United States Constitution and the Alaska Constitution.

The Alaska courts were apparently overwhelmed with the complexity of this case. They failed to understand and apply basic principles concerning the order of trials where legal and equitable issues are involved. In addition they failed to penetrate the Alyeska tariff-manipulation scheme and its relevancy in understanding Alyeska's otherwise inexplicable breach of its lucrative sales contract with the petitioner.

Under these circumstances one can reasonably infer that the Alaska Supreme Court did not take the necessary time to study and comprehend the voluminous trial record and the complex tariff issues involved in this prodigious litigation.

In addition to denying petitioner its constitutional right to a jury trial, failure to review and reverse the lower court's decision will, impliedly, condone an outrageous pipeline cost-inflating scheme, in direct violation of the Federal Energy Policy and Conservation Act.[4] This will result in millions of

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[4] See pp 114-117 of petitioner's 12/22/80 Trial Brief. These pages are contained in Appendix E. They explain the mechanism of how Alyeska, by artificially inflating pipeline costs, economically profited thereby and violated Section 401 of the Energy Policy Conservation Act and complex DOE regulations thereunder.

federal and state revenues being lost over the 30-year life of the pipeline along with saddling American consumers with unnecessarily higher energy costs.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Alaska Supreme Court.

Respectfully submitted,

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APPENDIX A

ALASKA NORTHERN DEVELOPMENT, INC.,
an Alaskan Corporation,
Appellant,

v.

ALYESKA PIPELINE SERVICE COMPANY,
a Delaware Corporation, Appellee.

No. 6353.

Supreme Court of Alaska.

June 10, 1983.

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Charles P. Flynn, Nelson G. Page, Burr, Pease & Kurtz, Anchorage, for appellee.

Before BURKE, C. J., and RABINOWITZ, MATTHEWS and COMPTON, J. J.

OPINION

COMPTON, Justice.

Alaska Northern Development, Inc. ("AND") appeals a judgment in favor of Alyeska Pipeline Service Co. ("Alyeska") in a dispute involving contract formation and interpretation. For the reasons stated below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In late October or early November 1976, David Reed, a shareholder and corporate president of AND, initiated discussion with Alyeska personnel in Fairbanks regarding the purchase of surplus parts. The Alyeska employees with whom

Reed dealt were Juel Tyson, Clarence Terwilleger and Donald Bruce.

After a series of discussions, Terwilleger indicated that Reed's proposal should be put in writing so it could be submitted to management. With the assistance of AND's legal counsel, Reed prepared a letter of intent dated December 10, 1976. In this letter, AND proposed to purchase "the entire Alyeska inventory of Caterpillar parts." The place for the purchase price was left blank.

Alyeska responded with its own letter of intent dated December 11, 1976. The letter was drafted by Bruce and Tyson in consultation with William Rickett, Alyeska's manager of Contracts and Material Management. Again, the price term was absent. The letter contained the following language, which is the focus of this lawsuit: "Please consider this as said letter of intent *subject to the final approval of the owner committee.*" (Emphasis added).

Reed was given an unsigned draft of the December 11 letter, which was reviewed by AND's legal counsel. Reed then met with Rickett, and they agreed on sixty-five percent of Alyeska's price as the price term to be filled in the blank on the December 11 letter. Rickett filled in the blank as agreed and signed the letter. In March 1977, the owner committee rejected the proposal embodied in the December 11 letter of intent.

AND contends that the parties understood the subject to approval language to mean that the Alyeska owner committee[1] would review the proposed agreement only to determine whether the price was fair and reasonable. Alyeska contends that Reed was never advised of any such limitation on the authority of the owner committee. In April 1977, AND filed a complaint alleging that there was a contract between AND and Alyeska, which Alyeska breached. The complaint was later amended to include counts for reformation and punitive damages.

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[1] The owner committee is composed of the owner oil companies of Alyeska, a joint venture.

Alyeska moved for summary judgment on the punitive damages and breach of contract counts. The superior court granted summary judgment in favor of Alyeska on the punitive damages count. The court initially denied Alyeska's motion for summary judgment on the breach of contract claim; however, based on a review of the case after discovery had closed, the court announced at a hearing on September 26, 1980, that it would reverse its earlier ruling and grant Alyeska's motion. The court confirmed this ruling at a hearing on November 5, 1980, after consideration of AND's Motion for Clarification.

The superior court explained its rationale for granting summary judgment against AND on the breach of contract claim as follows. The court recognized that AND predicated its breach of contract claim on the theory that Reed's letter of December 10th was an offer and that Rickett's letter of December 11th was an acceptance of that offer. Viewed in that light, the court addressed "four theoretical possibilities in analyzing the interplay between the December 11th letter and the December 10th letter." First, the writings could be construed as an offer with a responding promise to pass the offer on to the owner committee, which was responsible for making such determinations. Second, the letters could be construed as an offer and a counter-offer that AND rejected. Third, the letters could be considered as an offer with a responding counter-offer containing, among other things, the unlimited right of the owner committee to review and approve. The court ruled that if the letters were ultimately found to fall into one of these three categories, AND would not prevail, either because the offer embodied in the December 10 letter was never accepted, or because the owner committee never approved the proposal.

The only way in which AND might prevail was on the fourth possibility, i.e., the letters could be construed as an offer followed by a counter-offer limiting the authority of the owner committee to review only the contract price. The court ruled that AND could not establish a breach of contract claim under the fourth construction of the letters because the parol evidence rule barred the admission of extrinsic evidence that

might limit the scope of the owner committee's approval power.[2] The only recourse for AND, therefore, was to seek reformation of the December 11 letter that limited the owner committee approval clause.

The case proceeded to trial on the reformation claim. After a six-week trial, the superior court concluded that AND had failed to establish that a specific agreement was not properly reduced to writing and therefore rejected its request to reform the December 11 letter. Attorney's fees were awarded to Alyeska.

On appeal, AND does not challenge the superior court's denial of reformation. Instead, it contends that the superior court erred in granting summary judgment on the breach of contract and punitive damages counts, erred in denying a trial by jury on the reformation count, erred in not permitting cross-examination for purposes of impeachment, and erred in awarding attorney's fees to Alyeska.

II. APPLICATION OF THE PAROL EVIDENCE RULE

The superior court held that the parol evidence rule of the Uniform Commercial Code, section 2-202, codified as AS 45.02.-202,[3] applied to the December 11 letter and therefore

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[2] AND also predicated its breach of contract claim on the existence of a prior oral agreement. The superior court implicitly rejected this theory in its analysis of the parol evidence rule.

[3] AS 45.02.202 provides:

Final written expression; parol or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree, or which are otherwise set out in a writing intended by the parties as a final expression of their agreement with respect to the terms included in the writing, may not be contradicted by evidence of a prior agreement, or of a contemporaneous oral agreement, but may be explained or supplemented

(1) by course of dealing or usage of trade (AS 45.01.205) or by course of performance (AS 45.02.208); and

(2) by evidence of consistent additional terms unless the court finds the writing was intended also as a complete and exclusive statement of the terms of the agreement.

no extrinsic evidence could be presented to a jury which limited the owner committee's right of approval. AND contends that the court erred in applying the parol evidence rule. We disagree.

In order to exclude parol evidence concerning the inclusion of additional terms to a writing, a court must make the following determinations. First, the court must determine whether the writing under scrutiny was integrated, i.e., intended by the parties as a final expression of their agreement with respect to some or all of the terms included in the writing. Second, the court must determine whether evidence of a prior or contemporaneous agreement contradicts or is inconsistent with the integrated protion. If the evidence is contradictory or inconsistent, it is inadmissable. If it is consistent, it may nevertheless be excluded if the court concludes that the consistent term would necessarily have been included in the writing by the parties if they had intended it to be part of their agreement. AS 45.02.202; *Braund, Inc. v. White*, 486 P.2d 50, 56 (Alaska 1971); U.C.C. § 2-202 comment 3 (1977).

A. *Was the December 11 Letter a Partial Integration?*

An integrated writing exists where the parties intend that the writing be a final expression of one or more terms of their agreement. *Kupka v. Morey*, 541 P.2d 740, 747 n. 8 (Alaska 1975); Restatement (Second) of Contracts § 209(a) (1979). Whether a writing is integrated is a question of fact to be determined by the court in accordance with all relevant evidence. Restatement (Second) of Contracts § 209 comment c (1979).

In granting summary judgment on the breach of contract claim, the superior court stated that it had carefully considered all relevant evidence, including oral and written records of all facets of the business deal in question, to arrive at its finding

that the agreement was partially integrated.[4] After the six-week trial on the reformation issue, the superior court reaffirmed this finding:

> 35. The plaintiff initially contends that the letter of December 11, 1976 (the letter) was not integrated or partially integrated and therefore the court was in error in granting summary judgment in favor of defendant on the contract counts of the plaintiff's complaint on September 26, 1980.
>
> 36. After considering the evidence submitted at trial, the court reaffirms its prior conclusion that the letter was integrated as to the Owners Committee's approval clause.
>
> 37. The parties intended to write down their discussions in a comprehensive form which allowed Reed to seek financing and allow the primary actors (Tyson, Bruce, Terwilleger, Rickett) to submit the concept embodied by the letter to higher management . . .
>
> 38. There are three subjects upon which plaintiff seeks reformation . . . As to the first [limiting the Owner Committee to a consideration of price] which has been plaintiff's primary focus, the court finds that such reference was integrated such that the parole [sic] evidence rule would bar any inconsistent testimony. Testimony that the owners were limited to "price" in their review is inconsistent.

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[4] At the hearing on AND's Motion for Clarification, the superior court stated:

> [I]t seems to me absolutely conclusive on this evidence, and I'm making this as a finding of fact, that this agreement is partially integrated, and I'm not making it by reference only to the four corners of the—of the writings but reference to all the extrinsic evidence that has been proffered to me, read everybody's deposition, considered in detail all the processes of negotiations, everything that was said and done by everybody as related by them up till the time that Rickett included the language in the letter and turned it over to Reed. So we're not here talking about the for [sic] corners or ambiguity or anything like that. We're talking about all the extrinsic evidence, meaning on balance to a conclusion more probable than not that this is a partially integrated agreement.

. . . .

41. With respect to the Owners Committee's approval clause, according to the plaintiff's contention the owners were entitled to review the transaction, on whatever basis, only one time. This was testified to by both Mr. Reed and argued by plaintiff in closing . . . It was also conceded in closing that the review by the owners, on whatever standard, would occur prior to any formal contract being negotiated and executed . . . This is also consistent with the testimony of each of the participants.

42. In addition, Mr. Reed, in consultation with Ed Merdes and Henry Camarot, his attorneys, tendered the letter of March 4, 1977, as a document which could serve as "the contract" . . . The March 4 letter contains no further reference to the Owners Committee's approval function . . . Therefore, I find that as to the Owners Committee's approval . . . the letter of December 11 constitutes an integration or partial integration . . . This having been established, the analysis outlined by the court on September 26, 1980, when granting defendant's motion for summary judgment on the contract claims is applicable. [Citations omitted.]

After reviewing the record, we cannot say that this finding of a partial integration was clearly erroneous.

AND contends that the "clearly erroneous" standard used for reviewing findings of fact issued after a trial does not apply because the breach of contract claim was dismissed by summary judgment. Under the circumstances of this case, we believe that the clearly erroneous standard applies rather than the standard of review used in summary judgment cases because the summary judgment ruling was not a final judgment for purposes of appeal.

Rule 54(b) of the Alaska Rules of Civil Procedure provides in relevant part:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one . . . of the claims . . . upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the

> absence of such determination and direction . . . the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the pre-trial conference, the superior court indicated that it would make a Rule 54(b) determination if the parties so desired. The parties did not request a Rule 54(b) determination and none was made. During this conference, the court also made it clear that it was willing at the reformation trial to hear all evidence bearing on contract formation, including the negotiations leading up to the letters of intent and the meaning the parties placed on these negotiations and letters. The court emphasized that it was "not cutting out anybody on presenting extrinsic evidence . . . [and] that under Rule 54 the court can, until the end of the case . . . change any decision it's previously reached."

AND contends that the superior court's determination that the only issue at trial concerned reformation "necessarily foreclosed a variety of factual and legal issues on contract formation and interpretation," but does not indicate what evidence it was foreclosed from presenting on these issues. Our review of the record indicates that the integration issue was fully explored by AND during the trial.

After six weeks of testimony, during which time the court had the opportunity to view the demeanor and to judge the credibility of the witnesses, the superior court entered written findings of fact and conclusions of law. As shown in the portion quoted above, these findings reviewed and reaffirmed the findings made in the court's prior summary judgment ruling. Accordingly, the appropriate standard of review is the same as for any other finding of fact, i.e., that the superior court's findings of fact must be upheld unless "clearly erroneous." Alaska R.Civ.P. 52(a). As stated above, the finding of partial integration was not clearly erroneous; therefore, we find no merit in AND's contentions to the contrary.

B. *Does the Excluded Evidence Contradict the Integrated Terms?*

Having found a partial integration, the next determination is whether the excluded evidence contradicts the integrated portion of the writing. Comment b to section 215 of the Restatement (Second) of Contracts is helpful in resolving this issue.[5] Comment b states:

> An earlier agreement may help the interpretation of a later one, but it may not contradict a binding later integrated agreement. Whether there is a contradiction depends . . . on whether the two are consistent or inconsistent. This is a question which often cannot be determined from the face of the writing; the writing must first be applied to its subject matter and placed in context. The question is then decided by the court as part of a question of interpretation. Where reasonable people could differ as to the credibility of the evidence offered and the evidence if believed could lead a reasonable person to interpret the writing as claimed by the proponent of the evidence, the question of credibility and the choice among reasonable inferences should be treated as questions of fact. But the asserted meaning must be one to which the language of the writing, read in context, is reasonably susceptible. If no other meaning is reasonable, the court should rule as a matter of law that the meaning is established.

According to comment b, therefore, a question of interpretation may arise before the contradiction issue can be resolved. If the evidence conflicts, the choice between competing inferences is for the trier of fact to resolve. *Alyeska Pipeline Service Co. v. O'Kelley*, 645 P.2d 767, 771 n. 2 (Alaska 1982). The meaning is determined as a matter of law, however, if "the asserted meaning [is not] one to which the language of the writing, read in context, is reasonably susceptible."

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[5] Restatement (Second) of Contracts § 215, which parallels the rule stated in U.C.C. § 2-202, reads: "Except as stated in the preceding Section, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissable in evidence to contradict a term of the writing."

Restatement (Second) of Contracts § 215 comment b (1979). *See also* J. Calamari & J. Perillo, The Law of Contracts §§ 3-12, 3-13 (2d ed. 1977).

AND contends that the superior court erred in granting summary judgment because the evidence conflicted as to the meaning of the owner committee approval clause. It concludes that under *Alyeska* it was entitled to a jury trial on the interpretation issue. Alyeska contends, and the superior court ruled, that a jury trial was inappropriate because, as a matter of law, AND's asserted meaning of the clause at issue was not reasonably susceptible to the language of the writing. The superior court stated:

> The Court is making the . . . ruling that the offer of evidence to show that Rickett's letter really meant to limit owner committee approval to the price term alone . . . is not reasonably susceptible — or the writing is not reasonably susceptible to that purpose. And therefore, that extrinsic evidence operates to contradict the writing, not specific words in the writing, but the words in the context of the totality of the writing and the totality of the extrinsic evidence.

We agree that the words used in the December 11 letter are not reasonably susceptible to the interpretation advanced by AND. Therefore, we find no merit to AND's contention that it was entitled to a jury trial on the interpretation issue.

After rejecting the extrinsic evidence for purposes of interpretation, the superior court found AND's offered testimony, that the owner committee's approval power was limited to approval of the price, to be inconsistent with and contradictory to the language used by the negotiators in the December 11 letter. AND contends that the offered testimony did not contradict, but rather explained or supplemented the writing with consistent additional terms. For this contention, AND relies on the standard articulated in *Hunt Foods & Industries, Inc. v. Doliner*, 26 A.D.2d 41, 270 N.Y.S.2d 937 (N.Y.App.1966). In *Hunt Foods*, the defendant signed an option agreement under which he agreed to sell stock to Hunt Foods at a given price per share. When Hunt Foods attempted to

exercise the option, the defendant contended that the option could only be exercised if the defendant had received offers from a third party. The court held that section 2-202 did not bar this evidence from being admitted because it held that the proposed oral condition to the option agreement was not "inconsistent" within the meaning of section 2-202; to be inconsistent, "the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable." *Id.* 270 N.Y.S.2d. at 940.

The narrow view of consistency expressed in *Hunt Foods* has been criticized. In *Snyder v. Herbert Greenbaum & Associates, Inc.*, 38 Md.App. 144, 380 A.2d 618 (Md.App.1977), the court held that the parol evidence of a contractual right to unilateral rescission was inconsistent with a written agreement for the sale and installation of carpeting. The court defined "inconsistency" as used in section 2-202(b) as "the absence of reasonable harmony in terms of the language *and* respective obligations of the parties." *Id.* 380 A.2d at 623 (emphasis in original) (citing U.C.C. § 1-205(4)). *Accord: Luria Brothers & Co. v. Pielet Brothers Scrap Iron & Metal, Inc.*, 600 F.2d 103, 111 (7th Cir.1979); *Southern Concrete Services, Inc. v. Mableton Contractors, Inc.*, 407 F.Supp. 581 (N.D.Ga.1975), *aff'd mem.*, 569 F.2d 1154 (5th Cir.1978).

We agree with this view of inconsistency and reject the view expressed in *Hunt Foods.*[6] Under this definition of inconsistency, it is clear that the proffered parol evidence limiting the owner committee's right of final approval to price is inconsistent with the integrated term that unconditionally gives the committee the right to approval. Therefore, the superior

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[6] *Hunt Foods* was implicitly rejected in *Johnson v. Curran*, 633 P.2d 994, 996-97 (Alaska 1981) (parol evidence concerning an early termination right based on nightclub owner's dissatisfaction with the band's performance was inconsistent with parties' written contract specifying definite time without mention of any right of early termination and thus inadmissable).

court was correct in refusing to admit parol evidence on this issue.[7]

III. DENIAL OF A JURY TRIAL

At the trial on reformation, AND sought reformation of the contract and then recovery for Alyeska's breach of the contract as reformed. AND requested a jury trial, but the superior court refused to empanel a jury until it determined whether the contract should be reformed. The court stated that only if it decided to reform the contract would it empanel a jury to determine whether Alyeska breached the reformed contract.

AND contends that it was entitled to a jury trial under article I, section 16, of the Alaska Constitution, which preserves the right to a trial by jury in suits that determine legal rights. AND recognizes that reformation is an equitable, not legal, determination and therefore one for the court, not the jury, to decide; however, it contends that it was entitled to a jury trial because the court resolved legal issues concerning whether the parties had entered into a contract.

In support of its contention, AND relies on *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508, 79 S.Ct. 948, 955, 3 L.Ed.2d 988, 996 (1959), which held that when a case involves both legal and equitable claims, the facts common to such claims must be first tried to a jury if a proper demand is made.[8] *Beacon Theatres* does not apply in this case because the trial did not involve both legal and equitable claims. As we stated earlier, the superior court correctly dismissed the breach of contract claim because the parol evidence rule barred

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[7] Our affirmance of the superior court's holding that the proposed version is inconsistent with the integrated clause obviates discussion of whether the addition, if consistent, would have been included in the December 11 letter. Furthermore, we decline to reach AND's contentions regarding the applicability of U.C.C. § 2-207 because AND never raised the § 2-207 argument at the superior court level. *See, e.g., Jeffries v. Glacier State Telephone Co.*, 604 P.2d 4, 11 (Alaska 1979).

[8] The rule in *Beacon Theatres* is binding in federal courts only; however, in *Shope v. Sims*, 658 P.2d 1336 1340 (Alaska 1983), we adopted this rule in interpreting article I, section 16, of the Alaska Constitution.

the introduction of any extrinsic evidence to prove that the owner committee's approval power was limited to price. Therefore, the only issue at trial was whether the alleged contract should be reformed, which is an equitable determination.

The correct procedure when an action is brought to reform a contract and to recover on it as reformed is explained as follows: "If plaintiff seeks reformation and money damages on the contract as reformed, the court may decide whether to allow reformation but there is a right to jury trial on the reformed contract." 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2316, at 83 (1971). *See also* 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice ¶38.22 (2d ed. 1982). Under this procedure, if the superior court had reformed the contract, AND would be entitled to a jury trial concerning the breach of contract as reformed. Because the superior court refused to reform the contract, a ruling that AND does not contest, AND has no legal claim to present to a jury. Therefore, the superior court did not err in denying AND's request for a jury trial.

IV. PUNITIVE DAMAGES

AND contends that punitive damages are warranted in this case based on the following theory of conspiracy: Alyeska had an interest in inflating pipeline costs because, under the federal system of price controls, higher construction costs result in higher pipeline rates per barrel of oil. Alyeska breached the agreement with AND because the sale of surplus parts to AND would have decreased pipeline costs and therefore lowered the tariff. Therefore, punitive damages are appropriate because Alyeska's actions were tortious in nature and the public interest is served by the deterrent effect that punitive damages would have upon the future conduct of the oil companies that own Alyeska.

Punitive damages are not available in a breach of contract action unless " 'the wrongdoer's conduct can be characterized as outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another.' " *Alyeska Pipeline Service Co. v. O'Kelley,* 645 P.2d at 774 (quoting

Bridges v. Alaska Housing Authority, 375 P.2d 696, 702 (Alaska 1962)). Whether malice is present is a question of fact; however, "where there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice, the trial court need not submit the punitive damages to the jury." *Id.*

AND negotiated an arms-length business deal with Alyeska. It does not point to any evidence that would give rise to an "inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice." Therefore, it was not error for the superior court to grant summary judgment against AND on the punitive damages issue.

V. LIMITING THE SCOPE OF CROSS-EXAMINAION

At the reformation trial, AND attempted to cross-examine Alyeska's vice president of administration, George Nelson, with regard to whether he had ever had discussions on the impact that the proposed sale to AND would have on the cost of the pipeline project. AND contended that it was offering the evidence for the purpose of impeaching Nelson's testimony that he had no knowledge of the AND-Alyeska agreement on December 17, 1976, hoping to show that Nelson had a motive to distort his testimony. The superior court did not permit AND's line of questioning because, though tangentially relevant, it was concerned that the trial could turn into a proceeding on the truth or falsity of the conspiracy theory.

"Although relevant, evidence may be excluded if its probative value is outweighed by . . . considerations of undue delay [and] waste of time." Alaska R.Evid. 403. The standard for appellate review of a trial court's decision to exclude testimony is whether it abused its discretion. *Babinec v. State,* 586 P.2d 966, 968 (Alaska 1978).

It was the superior court's express concern to prevent the "side show [from] swallow[ing] up the circus." To allow counsel to fully examine Nelson as to his motivation would require that the court allow an exploration into the underlying conspiracy theory. The court stated that AND would not be permitted to proceed with its line of questioning unless AND could pro-

duce direct evidence that AND was an intended victim under the conspiracy theory. AND was unable to do so. Under these circumstances, the superior court did not abuse its discretion in limiting AND's cross-examination of Nelson.

VI. ATTORNEY'S FEES

AND challenges the superior court's award of approximately $463,000.00 in attorney's fees to Alyeska, which was fifty-three percent of its actual attorney's fees. Civil Rule 82 requires the court to award attorney's fees to partially compensate the prevailing party for attorney's fees incurred during the proceeding. This award will be set aside on appeal only if it is manifestly unreasonable and amounts to a clear abuse of discretion. *E.g., Palfy v. Rice,* 473 P.2d 606, 613 (Alaska 1970).

At the end of the trial, Alyeska asked for reimbursement of its full attorney's fees on the ground that the lawsuit had been brought in bad faith.[9] The court did not find that the lawsuit had been maintained in bad faith. It did find, however, that proceeding to trial on the reformation claim was frivolous at the time summary judgment was granted in the fall of 1980. The court then reviewed Alyeska's attorney's participation in the case, services rendered, and the nature of the case, and determined that an appropriate partial award for attorney's fees necessary to a prudent defense would be fifty-three percent of Alyeska's actual attorney's fees, or sixty-six percent of the fee base established by the court. We do not find this award to be manifestly unreasonable and therefore uphold the award.

For the foregoing reasons, the judgment of the superior court is AFFIRMED.

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[9] Full or substantially full attorney's fees may be awarded if the trial court finds that the losing party acted in bad faith in asserting a claim or defense. *Davis v. Hallett,* 587 P.2d 1170, 1171-72 (Alaska 1978); *Malvo v. J. C. Penney Co.,* 512 P.2d 575, 588 (Alaska 1973).

APPENDIX B

December 11, 1976

Mr. David Reed, President
Alaska Northern Development, Inc.
P.O. Box 60124
Fairbanks, Alaska 99706

Subject: Letter of Intent for Purchase of Alyeska's Entire Caterpillar and other Spare Parts Inventory

Dear Mr. Reed:

This will acknowledge your letter of intent dated December 10, 1976, advising that A.N.D., Inc. is willing to purchase the entire Alyeska inventory of Caterpillar and other major supplier and associated supplier parts including tools. You request a first right of refusal to purchase these items and request a letter of intent from Alyeska so stating. Please consider this as said letter of intent, subject to the final approval of the owner committee.

A.N.D., Inc. is hereby granted the sole and exclusive first right of refusal to purchase the entire Alyeska inventory of Caterpillar and other major supplier and associated supplier spare parts and tools from the Alyeska Pipeline Project. The terms and conditions upon which this letter of intent is issued are as follows:

(1) That the uniform purchase price for Caterpillar parts, whether new, used, refurbished, replaced, rusted, and scrap shall be 65 percent of the cost to Alyeska one year ago, based on Caterpillar's lower 48, FOB stateside list prices.

(2) In the case of Cummins Northwest, only, A.N.D., Inc. is granted a second right of refusal as to that company when said company does not exercise its first right of refusal.

(3) A.N.D., Inc. will furnish the crating material for the

shipment of parts when additional protective crating is needed over the present Alyeska packaging. A.N.D., Inc. will assign personnel to work with Alyeska personnel in inspecting and preparing shipments.

(4) A.N.D., Inc. will furnish transportation from Alyeska storage areas and will be afforded a reasonable length of time, without cost for storage, to remove the said parts for shipment. A.N.D., Inc. has the right to inspect parts on site.

(5) A.N.D., Inc. will take any size shipment during each month, or such earlier or later times as mutually agreeable between the parties.

(6) A.N.D., Inc. will provide Alyeska with an irrevocable revolving letter of credit stipulating therein that funds are available at the National Bank of Alaska, main office in Anchorage, to pay the purchase price of all said parts. Before shipment is made, funds covering the purchase price will be released by National Bank of Alaska from said line of credit and credited to Alyeska's account upon receipt by the bank of notification from Alyeska and A.N.D., Inc. certifying shipment is ready to be made. Alyeska understands that A.N.D., Inc. is relying upon this letter of intent to obtain a major portion of its financing and Alyeska in good faith intends to enter into a written contract with A.N.D., Inc. embodying the provisions of this letter of intent within a reasonable period of time hereafter.

Yours truly,

William M. Rickett
Manager of Contracts
and Materials Management

WMR/ew

December 10, 1976

Alyeska Pipeline Service Company
1835 Bragaw Street
Anchorage, Alaska 99504

Subject: Letter of Intent
Purchase of Caterpillar Spare Parts Inventory

Gentlemen:

This letter of intent submitted by Alaska Northern Development, Inc. hereafter called A.N.D., Inc. and Alyeska Pipeline Service Company, hereafter called APSC.

It is the intent of A.N.D., Inc. to purchase the entire Alyeska inventory of Caterpillar parts. This purchase would include new, used, refurbished, replaced, rusted, and scrap parts. The purchase price for all parts will be at _____ percent of cost to APSC one year ago, based on Caterpillar's lower 48 list prices.

The above offer is firm, subject to the following conditions:

(1) A.N.D. Inc. will have first right of refusal to purchase all spare parts of the other major suppliers and associated suppliers; i.e. Emerson, G.M., Ford, etc. In the case of Cummins Northwest, A.N.D., Inc. will have second right of refusal.

(2) A.N.D., Inc. will furnish the crating material for the shipment of parts when additional protective crating is needed over the present Alyeska packaging. A.N.D., Inc. will assign personnel to work with Alyeska personnel in inspecting and preparing shipments.

(3) A.N.D., Inc. will furnish transportation from Alyeska storage areas.

(4) A.N.D., Inc. wil have its principal bank furnish APSC with a irrevocable, revolving letter of credit stipulating funds are available to meet the purchase price of all Caterpillar parts. As shipments are made,

funds will be released upon receipt of notification certifying shipment signed by APSC and A.N.D., Inc.

(5) A sales agreement contract to be drawn up between A.N.D., Inc. and APSC which will incorporate the conditions of this letter of intent, as well as any conditions put forth by Alyeska and agreed to by A.N.D., Inc.

(6) A.N.D., Inc. will be prepared to take any size shipment each month and funds will be available. This is in the event other major parts lines become available for shipment along with the Caterpillar.

Yours truly,

David Reed, President

DR/ew

APPENDIX C

UNITED STATES CONSTITUTION. Amendment VII.

Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ALASKA CONSTITUTION, Article I, Section 16.

Civil Suits; Trial by Jury. In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three fourths of the jury and, in courts not of record may provide for a jury of not less than six or more than twelve.

APPENDIX D

TITLE IV—PETROLEUM PRICING POLICY AND OTHER AMENDMENTS TO THE ALLOCATION ACT

PART A—PRICING POLICY

OIL PRICING POLICY

SEC. 401. (a) 15 USC §751. The Emergency Petroleum Allocation Act of 1973 is amended by adding at the end thereof the following new sections:

"OIL PRICING POLICY

"SEC. 8. (a) 15 USC §757. Not later than the first day of the second full calendar month following the date of enactment of this section, the President shall promulgate and make effective an amendment to the regulation under section 4(a) 15 USC §753 of this Act which regulation, as amended, shall establish ceiling prices (or the manner of determining ceiling prices) applicable to any first sale of crude oil produced in the United States, such that the resulting actual weighted average first sale price for all such crude oil during such calendar month and each of the 39 months thereafter shall not exceed a maximum of $7.66 per barrel (hereinafter in this section referred to as the "maximum weighted average first sale price"), except as may be adjusted pursuant to this section.

"(b) (1) The regulation under section 4(a), as amended pursuant to subsection (a) of this section or by any subsequent amendment thereto, may, subject to the limitations related to the maximum weighted average first sale price and other requirements of this section, provide for different ceiling prices (or manner of determining ceiling prices) for different classifications of crude oil produced in the United States. In providing for different ceiling prices (or the manner for determining such ceiling prices) and classifications for such crude oil, the President shall determine that such ceiling prices (or the manner for determining such ceiling prices) and such classifications—

"(A) are administratively feasible; and

"(B) are justified on the basis that such prices and

such classifications are consistent with obtaining optimum production of crude oil in the United States.

"(2) No amendment to the regulation under section 4(a) made after the date of enactment of this section may permit, in any month which begins after such date, an increase in the price for any volume of old crude oil production from any priorities,[1] unless the President finds that such amendment—

"(A) will give positive incentives for (i) enhanced recovery techniques, or (ii) deep horizon development, from such properties; or

"(B) is necessary to take into account declining production from such properties; and

"(C) is likely to result in a level of production from such properties beyond that which would otherwise occur if no such amendment were made.

"(3) As used in paragraph (2), the term 'old crude oil production' means that volume of crude oil produced and sold from a property in a month which is equal to or less than the volume of old crude oil, as defined in section 212.72 of title 10, Code of Federal Regulations (as in effect on November 1, 1975), produced and sold from such property in the months of September, October, and November of 1975, divided by 3.

"(c) (1) Not later than 6 months after the effective date of the amendment promulgated under subsection (a), and not later than every 6 months thereafter, the President shall, on the basis of valid and reliable information (which may include information obtained by a a valid and reliable sampling technique) of actual first sale prices of domestic crude oil, determine whether and the extent to which the actual weighted average first sale price for crude oil produced in the United States during any 6-month period or portion thereof for which data are available following the effective date of the amendment promulgated under subsection (a) of this section, exceeded or was less than the maximum weighted average first sale price of such crude oil specified in subsection (a) as may be adjusted pursuant to this section.

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[1] So in original. Probably should be "properties."

"(2) If the President finds, pursuant to paragraph (1) of this subsection, that the regulations under section 4(a) 15 USC §753, as amended, resulted in an actual weighted average first sale price in excess of the maximum weighted average first sale price specified in subsection (a) as adjusted pursuant to this section, he shall amend the regulation to make such compensating adjustments as are necessary to result, in a corresponding period, in an actual weighted average first sale price for domestic crude oil sufficient to offset such excess.

"(3) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 4(a), as amended, resulted in an actual weighted average first sale price less than the maximum weighted average first sale price specified in subsection (a) as adjusted pursuant to this section, he may, notwithstanding the requirements of this section pertaining to such maximum weighted average first sale price, amend the regulation to make such compensating adjustments in the regulation as are necessary to offset the deficiency in a corresponding period.

"(d) (1) The amendment promulgated pursuant to subsection (a) of this section (or any subsequent amendment to the regulation under section 4(a) may provide for an adjustment to the maximum weighted average first sale price specified in subsection (a), such adjustment to begin no earlier than in the calendar month following the first month the amendment is in effect—

"(A) to take into account the impact of inflation as measured by the adjusted GNP deflator; and

"(B) as a production incentive;

except that any adjustment as a production incentive shall not permit an increase in the maximum weighted average first sale price in excess of 3 per centum per annum (compounded annually), unless modified pursuant to this section, and the combined effect of any such adjustments referred to in subparagraphs (A) and (B) shall not result in an increase in the maximum weighted average first sale price in excess of 10 per centum per annum (compounded annually), unless modified pursuant to this section.

"(2) As used in this subsection; the term 'adjusted GNP deflator' means the first revision of the quarterly percent change, seasonally adjusted at annual rates, of the most recent implicit price deflator for the gross national product which shall be computed and published for each calendar quarter by the Department of Commerce, subject to such additional modification as the President shall make to exclude therefrom any amount which he determines is attributable solely and directly to increases which occur after the date of enactment of this section in prices of imported crude oil, residual fuel oil, or any refined petroleum product resulting from concerted action of two or more petroleum exporting countries.

"(3) The adjustment as a production incentive referred to in paragraph (1) (B) may be made only on a finding by the President that such an adjustment is likely to provide positive incentive for—

"(A) the discovery or development of high cost and high risk properties (including new wildcat properties, and properties located on the Outer Continental Shelf, properties located north of the Arctic Circle, deep wells and deep horizons in onshore or offshore properties, and properties operated by independent producers);

"(B) the application of enhanced recovery techniques to producing properties to obtain a level of production higher than would otherwise occur from these properties, but for such adjustment; or

"(C) sustaining production from marginal wells, including production from stripper wells.

"(c) (1) Not earlier than 90 days after the effective date of the amendment promulgated under subsection (a) and not earlier than 90 days after the date of any previous submission under this subsection, the President may submit to the Congress, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, an amendment to the regulation promulgated under section 4(a) 15 USC §753 which provides for (A) a production incentive adjustment to the maximum weighted average first sale price in excess of the 3 per centum limitation specified in subsection (d) (1),

(B) a combined adjustment limitation in excess of the 10 per centum limitation specified in such subsection, or (C) both.

"(2) Any such amendment shall be accompanied by a finding that an additional adjustment as a production incentive, or a combined adjustment limitation greater than permitted by subsection (d) (1), or both is necessary to provide a more adequate incentive with respect to the matters refered to in subparagraphs (A), (B), or (C) of subsection (d) (3).

"(3) Any such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(f) (1) On February 15, 1977, the President shall submit to the Congress a report containing an analysis of the impact of any amendment adopted pursuant to this section on the economy and on the supply of crude oil, residual fuel oil, and refined petroleum products.

"(2) The President may submit with such report to the Congress, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, an amendment to the regulation promulgated under section 4(a) which—

"(A) provides for the continuation or modification of the adjustment as a production incentive (referred to in subsection (d) as may have been amended pursuant to subsection (e);

"(B) provides for a modification of the combined adjustment limitation (referred to in subsection (d), as may have been amended pursuant to subsection (e); or

"(C) provides for adjustments with respect to both subparagraphs (A) and (B).

"(3) Such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(4) If any such amendment is disapproved by either House of Congress, the President may, not later than 30 days after the date of such disapproval, submit one additional amendment

in accordance with paragraph (2), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(5) If no amendment to continue or modify the adjustment as a production incentive takes effect, no such adjustment to the maximum weighted average first sale price thereafter may be taken into account in computing such price for any month which begins after (A) the date on which a submission could have been made under paragraph (2) but was not, or (B) the last date on which a submission was disapproved and no further submission pursuant to paragraph (4) could be made, except that the President may, pursuant to the procedures under subsection (e), submit an amendment to the regulation to provide for a prospective reinsatement of such adjustment or of a modification of such adjustment.

"(g) (1) On April 15, 1977, the President shall submit to the Congress a report as to whether the regulation promulgated under section 4(a) and in effect on such date will provide positive price incentives for the development of the domestic crude oil production referred to in paragraph (2) (A) without lessening needed incentives for sustaining or enhancing crude oil production in the remainder of the United States.

"(2) If the President determines that a price required to provide positive price incentives for the development of domestic crude oil production referred to in paragraph (2) (A) would, because of the maximum weighted average first sale price specified in subsection (a) of this section, as adjusted, have the effect of reducing or limiting ceiling prices permitted for crude oil produced in the remainder of the United States to levels which would result in less production of such crude oil than would otherwise occur, the President may, together with such report, or at any time thereafter not earlier than 90 days after any previous submission under this subsection, except as provided in paragraph (4), submit to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act an amendment to the regulation promulgated under section 4 (a) which—

"(A) excludes up to 2 million barrels a day of crude oil production transported through the trans-Alaska pipeline from the computation of the maximum weighted average first sale price specified in subsection (a); and

"(B) establishes ceiling prices (or a manner of determining prices) for the first sale of crude oil production referred to in subparagraph (A) such that the actual weighted average first sale price for such production will not exceed the highest actual weighted average first sale price permitted under the regulation for significant volumes of any other classification of domestic crude oil.

"(3) Any such amendment shall be accompanied by such findings and supporting rationale as the President determines justify such ceiling prices (or manner for determining such prices). Any amendment submitted to the Congress pursuant to this subsection shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(4) If any such amendment is disapproved by either House of Congress, the President may not later than 30 days after the date of such disapproval submit one additional amendment in accordance with paragraphs (2) and (3), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(5) If any amendment submitted by the President to the Congress pursuant to this subsection becomes effective, such amendment may thereafter be further amended by the President, subject to the procedures and requirements of paragraphs (2) and (3) of this subsection, except that no such further amendment shall be submitted earlier than January 1, 1978, and thereafter no earlier than 90 days after the date of any previous submission made under this paragraph.

"(b) In any judicial review of an amendment required by this section to be submitted to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, the reviewing court may not hold

unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of this section or of subparagraph (A), (E), or (F) or section 706(2) of title 5, United States Code.

PASSTHROUGHS OF PRICE DECREASES

"SEC. 9 15 USC §758. Not later than the first day of the second full calendar month following the date of enactment of this section, the regulation under section 4(a) shall provide for a dollar-for-dollar passthrough in prices at all levels of distribution from the producer through the retail level of decreases in the costs of crude oil, residual fuel oil, and refined petroleum products (including decreases in costs which result from a reduction in the price of crude oil produced in the United States because of the amendment to such regulation required under section 8 (a))"

(b) (1) Subsections (d), (e), and (g) of section 4 15 USC §753 of the Emergency Petroleum Allocation Act of 1973 are repealed, and subsection (f) of such section 4 is redesignated as subsection "(d)" of such section 4.

(2) Section 4(a) of such Act is amended by (A) striking out "Subject to subsection (f)" and inserting in lieu thereof "Subject to subsection (d)"; and (B) striking out "Except as provided in subsection (e) such" and inserting in lieu thereof "Such".

(3) Section 4(c) of such Act is amended in paragraphs (1), (4), and (5) thereof by striking out "subsections (b) and (d)" wherever it appears and by inserting in lieu thereof in each case "subsection (b)."

(4) Section 406 12 USC §1904 of Public Law 93-153 is repealed.

(5) The amendments made by paragraphs (1), (2), (3), and (4) of this subsection to the Emergency Petroleum Allocation Act of 1973, shall take effect on the effecive date of the amendment to the regulation under section 4(a) 15 USC §753, required by section 8(a) of such Act.

APPENDIX E

(PP 114-117 OF PETITIONER'S 12/22/80 TRIAL BRIEF)

As further evidence that Alyeska really was disinterested in maximizing income from surplus sales, note that a surplus sale of Caterpillar and other equipment parts, worth approximately ten million dollars, at Gate 21, was to have been consummated in May of 1977. After bids were in and opened, the Alyeska operating company notified Surplus Management that it believed it needed the spare parts, and the bids, as a result were all cancelled. According to Alyeska's then Manager of Surplus Disposal, these items of surplus inventory, in Surplus Management's crating and bearing Surplus Management's identification tags were reshipped to Chandalar Camp where they sat out in the weather, unprotected for a period of several months, after which they were reshipped into Fairbanks in the same containers, still bearing the original Surplus Management markings. These materials were subsequently sold at a much later auction sale, for a considerably diminished price as a consequence of Alyeska's overhandling.

Other Alyeska Surplus Management Department employees were informed by their superiors that surplus items which had already been inventoried, crated, and placed in a departure area for sale, were to be returned to construction camps. They were incredulous because items identical to those for sale were already on hand at the various construction camps. Much later, as these employees predicted, the same surplus was returned to Fairbanks never having been used, but in many cases destroyed due to the lack of care. As a consequence of the mishandling and constant reshuffling, much of the surplus which had once been ready for sale as brand new, was sold as scrap.

3. Construction Expenses Increased Alyeska's ICC Tariff Rate Base and Longterm Income: To the extent that equipment, parts, and tools were lost, destroyed or expended in the TAPS construction effort, their cost became part of the TAPS tariff rate base, thus increasing the tariff which Alyeska can charge for their transportation of oil through the pipeline.

Some experts have concluded that:

> It is in the interest of the owner companies to make the cost base and, therefore, the tariff as high as possible regardless of the amount of money spent.
>
> * * * *
>
> Since the royalties and taxes paid by the State of Alaska are determined on the basis of the well-head price, it is in the interests of the [owner companies] to make the tariff as high as possible. This will minimize the amount that the owner companies will have to pay in royalties and taxes to the State of Alaska, and will maximize the amount of the cost of the TAPS which they can shift from themselves to the State of Alaska and its taxpayers.

R.C. Lind, *An Analysis of Cost Overruns In Constructing The Trans-Alaska Pipeline System*, dated August 8, 1977, at 37-8. Plaintiff's expert, Dr. Tussing has corroborated Dr. Lind's conclusion with specific calculations.

4. The Alyeska Owner Companies, During The Time That Construction Of The Pipeline Was Proceeding, Could Reasonably Have Anticipated Receiving A 160% Return Upon All Costs Spent During Pipeline Construction Through Complex DOE Regulations: The Alyeska owner companies, in concert with Alyeska, have conspired to artificially inflate the costs of construction of the Trans-Alaska Pipeline System in order to improperly and unfairly recover from the public, not only such wantonly inflated costs of construction, but also *profits* as a consequence of such losses.

Plaintiff's expert has conducted extensive research in this area. A.N.D. has made the significant discovery that the cost of transporting oil through the Alyeska Pipeline directly impacts the DOE establishment of maximum well-head oil prices under Section 401 of the Energy Policy and Conserrvation Act, 89 Stat. 941-46.

Under these complex DOE upper-tier/lower-tier national oil price ceiling structures, TAPS tariff rates have a "direct effect on the national composite (price for well-head oil) gover-

ning DOE's jurisdiction to raise oil prices." *See* record exhibit 30, 169 at 10-2. It is plaintiff's well-substantiated contention that TAPS oil transportation charges impact the national average composite oil price ceiling as follows: The higher the TAPS tariff, the higher will be the oil price ceilings which the Department of Energy is compelled to allow under its legislative mandate. In turn, higher oil price ceilings mean higher petroleum product prices and unfairly inflated oil industry profits. Stated differently, the higher Alyeska's costs of construction, the higher the TAPS tariff, and consequently the higher will be the ceiling price on regulated oil in the United States. Under the pricing formula of the Energy Policy and Conservation Act, the bulk of any reduction in the Alaska North Slope producers' revenue caused by high TAPS tariffs will be recouped by the United States crude oil producing industry through higher DOE ceiling prices on lower-tier and upper-tier non-Alaska North Slope oil. It is apparent that the Alyeska owner companies anticipated a "cost-plus pricing" system of tariff setting. Under such a system, the Alyeska owner companies would recoup not only their TAPS construction costs, but also a profit factor amounting to as much as six million dollars on each ten million dollars in TAPS construction cost. In other words, for each ten million dollars expended on construction, Alyeska owner companies would have expected to receive sixteen million dollars in return under the TAPS tariff mechanism. It is illogical for the Alyeska owner companies to have argued as strenuously as they have for the high tariffs submitted and calculated under the present ICC tariff-setting formulae, unless they expected to receive this hidden benefit under the present tariff system.

These factors solidly support plaintiff's contention that Alyeska, at the time of contracting with the plaintiff for the disposal of the Alyeska inventory of surplus parts and tools, had no good faith intention of ever conforming to the terms of such an agreement. Indeed, Alyeska in bad faith and with disregard for reasonable management practices, undertook a concerted effort to maximize the costs of TAPS construction in order to maximize the longterm profits of its owner companies. Performance of the agreement between the parties

would have substantially impacted this endeavor: Alyeska's constructions costs for tariff rate-base purposes would have been markedly reduced by performance of the A.N.D. contract. "Unfortunately" for Alyeska and its owner companies, George Nelson and William Rickett were not privy to this byzantine strategy in late 1976 when the A.N.D. contract was negotiated. Obviously Nelson got the message in February 1977, gave Mr. Rickett the axe, and set in motion the scenario of cover-up and stonewalling that Alyeska has manifested throughout this litigation.

TRIAL BRIEF
SSD/WJS/lw

83-648

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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALASKA NORTHERN DEVELOPMENT INC.,
AN ALASKAN CORPORATION, *Petitioner,*

v.

ALYESKA PIPELINE SERVICE COMPANY,
A DELAWARE CORPORATION, *Respondent.*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BURR, PEASE & KURTZ
810 N Street
Anchorage, Alaska 99501
By: Charles P. Flynn
Counsel for Respondent

November 18, 1983

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810 N Street
Anchorage, Alaska 99501
By: Charles P. Flynn
Counsel for Respondent

November 18, 1983

I. SUMMARY OF OPPOSITION

Petitioner, Alaska Northern Development, Inc. (AND), brought suit against Alyeska Pipeline Service Company (Alyeska) in the Alaska state courts, alleging the existence of a contract between the parties and Alyeska's breach of that contract. AND lost its case before a state trial court and again on appeal to the Supreme Court of the State of Alaska. No issues of federal law, either statutory or constitutional, were ever raised or briefed by the parties or passed upon by the state courts. This Court is therefore without jurisdiction to review the "federal questions" manufactured by AND for purposes of its Petition. Moreover, viewed on their merits, the issues of state constitutional and evidentiary law raised here by AND were properly decided by the Alaska Supreme Court.

II. STATEMENT OF FACTS

In November, 1976, David Reed, a principal of AND, began inquiries in Fairbanks regarding a possible purchase by AND of equipment and materials left over from construction of the Trans Alaskan Pipeline System (TAPS). Tr., pp. 1166-68, 1176-77, 3408-09. Reed had a number of discussions with Alyeska personnel, who informed him that any proposed purchase of surplus materials was subject to prior review by Alyeska's Owner Committee, consisting of representatives of each of the companies participating in the TAPS project. Tr., pp. 1331-33, 1352-53, 1362-63, 1371, 2036, 3419-22.

In early December, Reed suggested that his tentative discussions with Alyeska personnel be reduced to writing so that he would have something to show to his fellow shareholders and alleged financial backers to prove that he was indeed engaged in serious negotiations. Tr. pp. 1178, 3434. Alyeska personnel, in return, informed Reed that they wanted something in writing that could be presented to Alyeska's management and the Owner Committee for review, to determine whether Alyeska had any real interest in pursuing a contract with AND on the terms suggested by Reed. Tr., p. 3429.

Reed submitted to Alyeska a letter, which he termed a "draft" of a contract for the purchase of Alyeska's "inven-

tory of Caterpillar parts." Tr. pp. 1430-31. Alyeska personnel drafted a response, which included this language:

> You request a first right of refusal to purchase these items and request a letter of intent from Alyeska so stating. Please consider this as said letter of intent, *subject to the final approval of the Owner Committee.* [Emphasis added.]

Appendix B, p.1. The Owner Committee met on March 10, 1977, and decided against approving any agreement with AND. *See* Exhibit 30, 142.

AND sued Alyeska, claiming a breach of contract. After extensive discovery and motions for summary judgment by each side, the State Superior Court determined, as a matter of state law, that Alyeska was entitled to summary judgment on AND's claim for breach of contract on the basis of the December 11 letter. However, the court ordered a trial on the issue of reformation, reasoning that AND should have the opportunity to present evidence that the December 11 letter, and specifically the Owner approval term, was improperly memorialized. The reformation action, equitable in nature, was tried to the court without a jury in January and February, 1981.

At the close of trial, the Superior Court denied reformation. AND appealed to the Alaska Supreme Court, which affirmed the trial judge's findings and grant of summary judgment in all respects. *Alaska Northern Development Inc. v. Alyeska Pipeline Service Company,* 666 P.2d 33 (Alaska 1983). AND has now petitioned this Court to grant certiorari to review the decision of the Alaska Supreme Court.

III. ARGUMENT

A. THE JURY ISSUE

1. AND Did Not Assert a Federal Right to Jury Trial in the State Court

In the State proceedings, AND never asserted a *federal* right under the Seventh Amendment to a jury trial on the issue of contract reformation. Perhaps AND's oversight was due to its familiarity with the fundamental principle of constitutional law ". . . that the Seventh Amendment applies only to

proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same." *Minneapolis and St. Louis Railroad Co., v. Bombalis,* 36 S.Ct. 595, 596, 241 U.S. 211, 217, 60 L.Ed 961 (1916); *see also Hardware Dealers' Mutual Fire Insurance Co. of Wisconsin v. Glidden Company,* 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214 (1931). AND has ignored this principle in its attempt to create a federal question for purposes of certiorari.

AND asserts that "where a State construes its constitution in accordance with the federal Constitution this Court will analyze the result to assure conformity with federal guarantees," citing *South Dakota v. Neville,* 103 S.Ct. 916, 919 n. 5 (1983). *Neville* does not support that proposition and is easily distinguishable. First, and most obviously, the federal issues were raised in the state courts in *Neville.* In this case only state issues were raised in the state courts. Second, assumption of jurisdiction in *Neville* turned on a determination that all significant analysis in the state courts involved the federally guaranteed right, and that the determination of state rights in the state court would follow the determination of federal rights. *Id.* at 103, S.Ct. 919 n. 5. In this case, no federally guaranteed right was analyzed or ruled upon by the state courts, because none was raised by AND. 666 P.2d at 40.

AND's arguments in the Alaska courts were restricted to Article I, Sec. 16, of the Alaska Constitution. In the trial court, AND filed a "Memorandum in Support of Motion to Confirm Plaintiff's Demand for a Jury Trial" on December 16, 1980 (R.4737), in which it relied completely on the Alaska Constitution, citing federal cases only for their interpretive guidance. AND's State Supreme Court briefs, likewise, while noting that the Alaskan constitutional provision regarding civil juries "is similar to the Seventh Amendment of the United States Constitution," argued exclusively a *state* constitutional right to a jury trial. Appellant's Brief (Alaska Supreme Court, Case No. 6353) p. 69. The Alaska Supreme Court thus noted in its opinion, "AND contends that it was entitled to a jury trial *under article I, sec. 16 of the Alaska Constitution.*" 666 P.2d at 40 (emphasis added). The Alaska Supreme Court's failure

to consider a *federal* right to a jury trial, alone, creates a presumption that AND failed to raise the issue below:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street v. New York,* 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed. 2, 572 (1969).

Webb v. Webb, 101 S.Ct. 1889, 1891, 451 U.S. 493, 495-96, 68 L.Ed.2d 392 (1981).

AND makes an awkward attempt at compliance with Supreme Court Rule 21.1(h), which requires a petition for certiorari to specifically identify where the federal question was raised and ruled upon in the state court proceedings. AND cites in passing to "TR 5431-47," which it claims demonstrates where "the deprivation of petitioner's constitutional right of a jury trial was promptly raised." Petition for Certiorari, p.6. In actuality, the cited pages are an excerpt from the trial court's oral decision ordering a trial on the reformation issue, in which the judge announced his holding that *state* law did not require a jury trial on the issue of contract reformation. The trial court, like the Alaska Supreme Court and AND itself, discussed federal Seventh Amendment case law only to support its interpretation of the similar Alaska constitutional provision. AND *never* "timely and properly raised" a federal question as required by Rule 21.1(h).

The consequence of AND's failure to raise a federal issue below is that this Court lacks jurisdiction to consider its Petition for Certiorari. *Webb, supra,* 101 S.Ct. at 1892, 451 U.S. at 496-97; *Tacon v. Arizona,* 93 S.Ct. 998, 999, 410 U.S. 351, 352, 35 L.Ed.2d 346 (1973); *Cardinale v. Louisiana,* 89 S.Ct. 1161, 1162-63, 394 U.S. 437, 438, 22 L.Ed.2d 398 (1969).

What AND *did* raise below, as demonstrated above, was a right asserted under the Alaska Constitution, Article I, Sec. 16. The State Supreme Court thoroughly considered AND's argued application of the Alaska Constitution and rejected it. 666 P.2d at 40-41. AND's claim that the Alaska Supreme

Court's holding in this case is inconsistent "with its own decision in *Shope v. Sims*, 658 P.2d 1336 (Alaska 1983)" (Petition, p.11) does not even facially present a federal question. This Court has often emphasized the finality of a state court's interpretation of state statutes and constitutional provisions, *Brown v. Ohio*, 87 S.Ct. 2221, 2226, 432 U.S. 161, 167, 53 L.Ed.2d 187 (1977); *Garner v. Louisiana*, 82 S.Ct. 248, 254, 368 U.S. 157, 169, 7 L.Ed.2d 207 (1961), and has recently noted that states are free to interpret their own constitutions differently from the federal Constitution. *Connecticut v. Johnson* 103 S.Ct. 969, 974 n. 9 (1983). The Alaska Supreme Court has interpreted and applied the Alaska Constitution in this case, and this Court lacks jurisdiction to review its decision.

2. On Its Merits, AND's Jury Trial Issue Was Properly Decided By The Alaska Supreme Court

On its merits, AND's claim to a jury trial on the issue of contract reformation was decided correctly by the Alaska Supreme Court. The only issue under consideration at the trial in this case was whether the correspondence of the parties should be reformed consistent with AND's contentions. Reformation, under both Alaskan and federal law, is an equitable action to be tried to the court sitting without a jury. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* (1971) §2316, at pp. 82-83. If the trial court had ordered reformation at the close of the trial, only then would AND have had a right to have a jury decide whether a contract existed, or was breached. Thus, as the Alaska Supreme Court held, "[b]ecause the Superior Court refused to reform the contract, a ruling that AND does not contest, AND has no legal claim to present to a jury." 666 P.2d at 41. As the Alaska Supreme Court properly held in *Shope, supra* at 1340, it is only where there are factual issues *common* to both the legal and equitable claims that those issues must be tried to a jury. In this case there were no legal issues for presentation because all legal claims had been dismissed, and because no factual determinations in the reformation trial would bind AND in any subsequent jury trial.

B. THE EVIDENTIARY ISSUE

1. This Court Lacks Jurisdiction to Consider AND's Evidentiary Issue

AND's other supposedly "federal" question, succinctly stated, is whether the state trial court's refusal to admit certain impeachment evidence "deprived the petitioner of a trial on the merits." Petition, p. i. AND attempts to give this state law evidentiary issue a "federal question" aura by citing to the Federal Energy Policy and Conservation Act, 15 U.S.C §757, an alleged violation of which AND sought to prove on cross-examination at the reformation trial.[1] The Superior Court excluded the evidence on the basis of Alaska Evidence Rule 403, which permits the exclusion of evidence, even if relevant, "if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Alaska Supreme Court affirmed the trial court's evidentiary ruling. 666 P.2d at 42.

AND states no federal question based on the trial court's application of Alaska's evidence rules. That the proffered impeachment evidence involved a purported violation of a federal statute does not bootstrap the evidentiary ruling into the federal arena. On the contrary, a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Marshall v. Lonberger*, 103 S.Ct. 843, 851 n. 4 (1983), quoting *Snyder v. Massachusetts*, 54 S.Ct. 330, 332, 291 U.S. 97, 105, 78 L.Ed. 674 (1934). The discretionary evidentiary ruling of the state trial court in this case, affirmed on appeal to the Alaska Supreme Court, has no federal dimension whatsoever.

AND does not even attempt to comply with this Court's Rule 21.1(h), which requires a petitioner to specify the stage

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[1] AND did not plead a cause of action based upon this or any other federal statute.

in the proceedings and the manner in which the federal questions were raised and to show "the way in which they were passed upon by the [state] court." AND has never before claimed that the trial court's exclusion of the proffered impeachment evidence deprived AND of some *federal* right, and this Court therefore has no jurisdiction to review such a claim. *Webb v. Webb*, 101 S.Ct. 1889, 1891, 451 U.S. 493, 494-96, 68 L.Ed.2d 392 (1981); *Cardinale v. Louisiana*, 89 S.Ct. 1161, 1162, 394 U.S. 437, 438, 22 L.Ed.2d 398 (1969).

2. On Its Merits, the Evidentiary Issue Was Properly Decided By The Supreme Court

AND's "tariff conspiracy" theory was a red herring and nothing more, certainly not a substantial question for this Court's review. It had no basis in fact, but depended on the Court's acceptance of a contorted syllogism: AND argued that Alyeska eventually made less money on sales of surplus equipment than it might have made under AND's "contract," thereby increasing the net cost of the pipeline; that by so doing Alyeska had, by virtue of some purported tariff "formulae," incredibly transformed these higher costs into bigger profits; and that Alyeska, therefore, must have conspired to decrease profits from surplus sales in order to defraud American consumers, breaching AND's contract along the way.

The "evidence" of this conspiracy theory was initially offered to support AND's claim for punitive damages for Alyeska's alleged breach of contract. The Alaska Supreme Court affirmed the trial court's grant of summary judgment on AND's punitive damages claim based on AND's failure to present even a prima facie case under Alaska law. The Court held that AND's failure after voluminous discovery to present any evidence of a conspiracy, or that it was directed at AND, barred the claim for punitive damages. 666 P.2d at 41.

AND then sought to introduce its "tariff conspiracy" theory into the reformation trial as impeachment on the cross-examination of George Nelson, one of Alyeska's officers. The evidence was allegedly offered "to impeach his credibility on the issue of when he first knew of the December 11 letter."

Petition, p. 8. However, as is evident from the hyperbolic ramblings in AND's petition regarding "Alyeska's mammoth tariff-manipulation fraud on American consumers and taxpayers" (p. 10; *see* pp. i, 7-8, 9-10, 14), AND wished to do considerably more with the excluded evidence than prove the extent of Nelson's knowledge on a particular date: it wished to turn a simple reformation trial into a witch hunt. Under these circumstances, as the Alaska Supreme Court held, the trial court properly excluded the evidence under Alaska Evidence Rule 403 due to "considerations of undue delay [and] waste of time." 666 P.2d at 42.

IV. CONCLUSION

AND has never before asserted a "federal question," and this Court therefore lacks jurisdiction to consider its claims. Moreover, AND's purported "federal questions" are not "federal" at all, but matters of state constitutional and evidentiary law properly left to the courts of the State of Alaska. Finally, those matters were clearly decided correctly by the Alaska courts and therefore present no substantial questions for this Court's review.

DATED this 18th day of November, 1983.

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Service Company

By: _____
Charles P. Flynn, Attorney of Record

APPENDICES

APPENDIX A

ALASKA RULES OF EVIDENCE Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

UNITED STATES CONSTITUTION. Amendment VII. Trial by jury in civil cases.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

ALASKA CONSTITUTION, Art. I, § 16. Civil Suits; Trial by Jury.

In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

RULES OF THE SUPREME COURT Rule 21. The Petition for Certiorari.

.1. The petition for writ of certiorari shall contain, in the order here indicated:

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such

pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule.

APPENDIX B

December 11, 1976

Mr. David Reed, President
Alaska Northern Development, Inc.
P.O. Box 60124
Fairbanks, Alaska 99706

Subject: Letter of Intent for Purchase of Alyeska's Entire Caterpillar and other Spare Parts Inventory

Dear Mr. Reed:

This will acknowledge your letter of intent dated December 10, 1976, advising that A.N.D., Inc. is willing to purchase the entire Alyeska inventory of Caterpillar and other major supplier and associated supplier parts including tools. You request a first right of refusal to purchase these items and request a letter of intent from Alyeska so stating. Please consider this as said letter of intent, subject to the final approval of the owner committee.

A.N.D., Inc. is hereby granted the sole and exclusive first right of refusal to purchase the entire Alyeska inventory of Caterpillar and other major supplier and associated supplier spare parts and tools from the Alyeska Pipeline Project. The terms and conditions upon which this letter of intent is issued are as follows:

(1) That the uniform purchase price for Caterpillar parts, whether new, used, refurbished, replaced, rusted, and scrap shall be 65 percent of the cost to Alyeska one year ago, based on Caterpillar's lower 48, FOB stateside list prices.

(2) In the case of Cummins Northwest, only, A.N.D., Inc. is granted a second right of refusal as to that company when said company does not exercise its first right of refusal.

(3) A.N.D., Inc. will furnish the crating material for the shipment of parts when additional protective crating

is needed over the present Alyeska packaging. A.N.D., Inc. will assign personnel to work with Alyeska personnel in inspecting and preparing shipments.

(4) A.N.D., Inc. will furnish transportation from Alyeska storage areas and will be afforded a reasonable length of time, without cost for storage, to remove the said parts for shipment. A.N.D., Inc. has the right to inspect parts on site.

(5) A.N.D., Inc. will take any size shipment during each month, or such earlier or later times as mutually agreeable between the parties.

(6) A.N.D., Inc. will provide Alyeska with an irrevocable revolving letter of credit stipulating therein that funds are available at the National Bank of Alaska, main office in Anchorage, to pay the purchase price of all said parts. Before shipment is made, funds covering the purchase price will be released by National Bank of Alaska from said line of credit and credited to Alyeska's account upon receipt by the bank of notification from Alyeska and A.N.D., Inc. certifying shipment is ready to be made. Alyeska understands that A.N.D., Inc. is relying upon this letter of intent to obtain a major portion of its financing and Alyeska in good faith intends to enter into a written contract with A.N.D., Inc. embodying the provisions of this letter of intent within a reasonable period of time hereafter.

Yours truly,

William M. Rickett
Manager of Contracts
and Materials Management

WMR/ew

83-648

Office - Supreme Court, U.S.
FILED
DEC 2 1983
ALEXANDER L. STEVAS
CLERK

NO. -

ON THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ALASKA NORTHERN DEVELOPMENT INC.
AN ALASKAN CORPORATION, Petitioner,

v.

ALYESKA PIPELINE SERVICE COMPANY,
A DELAWARE CORPORATION, Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BOYKO, DAVIS AND DENNIS
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November 29, 1983

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November 29, 1983

ANALYSIS OF RESPONDENT'S OPPOSITION

In its opposition brief, respondent made two basic arguments:

(1) No federal statutory or constitutional issues, "were ever raised or briefed by the parties or passed upon by the state courts", on either the tariff manipulation or jury trial issues.

(2) These issues were properly decided on the merits by the Alaska Supreme Court.

REBUTTAL ARGUMENT

THESE ISSUES WERE RAISED AND BRIEFED IN THE COURTS BELOW:

(a) TARIFF MANIPULATION SCHEME

On page 2e in appendix "E" of our petition, there is an excerpt from petitioner's December 12, 1980 trial brief. Therein, we specifically argued that the reason for the pipeline company's arbitrary veto of the lucrative December 11, 1976 letter of intent agreement, was in furtherance of Alyeska's scheme to 'Artifically inflate

the costs of construction of the Trans-Alaska Pipeline System in order to improperly and unfairly recover from the public, not only such wantonly inflated costs of construction, but also PROFITS as a consequence of such losses.

...that the cost of transporting oil through the Alyeska Pipeline directly impacts the DOE establishment of maximum well-head oil prices under Section 401 of the Energy Policy and Conservation Act, 89 Stat. 941-46."

The same argument was made before the Alaska Supreme Court on pages 55-60 of Petitioner's 5 May 1982 brief filed with that court.

In Connecticut v. Johnson 103 S.Ct. 969, 974, 74 L.Ed.2d 823, 830 (1983), this court reaffirmed its earlier decision in Brown v. Ohio 87 S.Ct. 2221, 53 L.Ed.2d 187 (1977) holding that where a state court's interpretation of its own law infringes on a federal right, this court will review it and not be bound by the state's interpretation. See also Street v. New York

394 U.S. 576, 22L.Ed. 2d 572, 579 where this court said, "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this court is not bound by the decision of the state courts."

In this case, - despite the issue being timely raised and briefed before both lower courts - the Alaska Supreme filed to even discuss the alleged violation of the federal Energy Policy and Conservation Act of 1975. Both Connecticut and Brown impliedly hold that such an omission does not preclude this court from assuming jurisdiction and considering such issues.

(b) JURY TRIAL ISSUE

Respondent argues petitioner never asserted a violation of its Seventh Amendment right to a jury trial on the issue of contract formation.

On page 4 of its opposition brief, respondent cited various decisions of this court in support of the general proposition that this court as a matter of policy will follow the interpretation of state laws or constitution by its highest court.

What the respondent failed to address however, is our underlying argument that the Alaska Supreme Court in two of its most recent decisions - Shope v. Sims, 658 P.2n 1336 (Alaska 1983) and Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co., 666 p.2d 33, FN.8 (Alaska 1983), adopted as its own, this court's decision in Beacon Theaters v. Westover, 395 U.S. 500, 3 L.Ed.2d 988 (1950). That court therefore bound itself to follow Beacon.

Beacon held that a case involving both legal and equitable claims must be first tried before a jury. In this appeal, it has been established that after granting summary judgment to the respondent on the contract formation issue - despite the existence of disputed issues of material facts - the trial court over the petitioner's objections conducted a six-week non-jury reformation trial. Upon its conclusion, the trial judge resolved substantive issues of disputed facts in respondent's favor on the contract formation issue.

This action clearly contravenes this court's decision in Beacon and its own decision in Shope and effectively deprives petitioner of its right to a jury trial under both the Alaska and Federal Constitutions.

By adopting Beacon's rationale in interpreting the Seventh Amendment as its own interpretation of almost the identical provision in Article I, Section 16 of Alaska's Constitution, the Alaska Supreme Court brought itself within the holding of this court in South Dakota v.Neville 74 L.Ed.2d 748 (1983). In that case, the South Dakota Supreme Court ruled that a violation of its own constitution automatically constituted a violation of the similar Fifth Amendment to the United States Constitution. On that premise, this court granted certiorari based upon the following reasoning: " 'since the Fifth Amendment of the U.S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between SD Const. Art VI, Sect. 9 and the Fifth Amendment of the U.S. Constitution.' Ibid. The court could not

have stated more clearly that it simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege. This was precisely the reasoning we found sufficient in PROUSE to give us jurisdiction to hear the case and decide the federal consitutional issue."

Further, in FN. 5 in Neville at 74 L.Ed.2d page 754, this court analyzed the Prouse case as follows, "The analysis of the court below was remarkably similar to that of the state court opinion reviewed in Delaware v. Prouse, 440 U.S. 648, 651-653, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979). That state court opinion analyzed various decision interpreting the Federal Constitution, concluded that the Fourth Amendment violated the police procedure at issue there, and then summarily held that the State Consititution was therefore also infringed. As we characterized their analysis, every police practice found to violate the Fourth Amendment would, without further analysis, be held to be contrary to the State Constitution as well. In such a situation,

we concluded, this Court has jurisdiction to review the federal constitutional issue decided below."

In this case, both lower courts violated the petitioner's right to a jury trial. First, by increduously granting summary judgment to respondent after first granting summary judgment to the petitioner. This was done in the face of existing disputed issues of material fact on contract formation. These disputed facts--along with the undisputed ones favoring petitioner - were found to exist by the trial court itself.

Appendix "A" contains Trial Judge Singleton's exact words and reasons -- delivered in open court on March 19, 1980 -- for granting petitioner partial summary judgment on the contract formation issue. Increduously, six months later, in September, 1980, the trial judge, sua sponte, reversed himself. Without the request of either counsel, he set aside said partial summary judgment, resurrected and granted respondent's previously denied motion for summary judgment -

also on the contract formation issue. After the January, 1981 non-jury reformation trial, he made factual findings adverse to Petitioner, also on the contract formation issue. He then utilized these findings of fact to reaffirm his September 1980 grant of summary judgment to the respondent.

An objective reading and analysis of Judge Singleton's verbatim remarks must surely leave one with the firm conviction there are, at the very least, disputed issues of material facts remaining on the contract formation and tariff manipulation issues. The Alaska Supreme Court deprived petitioner of its constitutionally guaranteed right to a jury trial on the same.

CONCLUSION

For these reasons and because said issues were timely raised and briefed below and erroneously decided by the Alaska Supreme Court, this Court has jurisdiction to grant certiorari.

DATED this 29th day of November, 1983.

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APPENDIX A

TRIAL JUDGE SINGLETON'S VERBATIM REMARKS MADE IN OPEN COURT ON MARCH 9, 1980:

"First of all, I want to commend counsel, both teams, for I think, very complicated materials. I think that after reviewing all the information, listening to and evaluating the final oral arguments, it seems to me that the following conclusions are appropriate:

First of all, I think the parties did have a contract. I think that Rickett had authority to enter into the contract he entered into. I think that to the extent that there was a limitation on his authority, he incor-porated that limitation into the contract. That limita-tion was subject to the owner committee approval. Now, lest I be accused of giving with one hand and taking away with the other, the "subject to" language does not preclude the finding of a contract. It doesn't preclude the finding of a meeting of the minds. It simply holds out a possibility that may or may not come

to pass and the possibility is that the committee will for good cause reject a particular offer. What then are good causes that would justify that rejection? Plaintiff contends that the only good cause would be dissatis-faction with the price. I think Mr. Flynn is correct that the structuring of the offer in the first right of refusal way is another item which a jury might find to legitmately lead the committee to reject the contract. Perhaps not. I think that's a fact question. Thirdly, concern by the committee about plaintiff's ability to perform I think is a legitimate area of concern and one that the jury might find would be a legitimate basis for rejecting the contract. In saying that, I haven't gotten into, because I think it's an open issue that the parties are in the process of briefing, whether any concern about ability to perform is governed by the assurances provision in the Uniform Commercial Code. That is an issue that is not ripe for decision at this time. It's one that's been broached. It's one that there will be a response to and the Court

certainly will resolve it when it does. But pending resolution of that, it seems to me ability to perform is significant. Why? Well, I think Mr. Flynn is correct that the pick and choose opportunities of the plaintiff might have had significance beyond the things picked and chosen. Certainly in terms of delaying the ultimate disposal of the surplus. So, I think those, without going into great detail or attempting to analyze this matter far beyond what's been done so far, it seems to me these are additional areas that could be considered, so the Court is prepared to instruct the jury that there was a contract, that the contract is reflected in the papers, and that reasonable men could differ regarding precisely what criteria the management committee could utilize in determining whether to accept or reject the contract so long as the jury understands that the rejection must be made in good faith and based upon considerations central to the circumstances. In other words, a jury must be able to find if there were a discharge, that the committee acted with regard to

the subject matter of the surplus activities and not for some other reason. And so the Court is prepared to grant partial summary judgment to plaintiffs to that extent. The issue will still remain open as to whether the committee acted properly in rejecting this contract, either because of concerns about ability to perform or because the first right of refusal might in effect cost them more over the long-run than they were to gain. Let me just eleborate a moment on that. I think the thrust of the dispute between Mr. Flynn and Mr. DeLisio today is a valid one to put to the jury and that is whether 65% of what is picked and chosen is really the conceptual equivalent of as much as they could have gotten marketing the materials in some other way. If the answer is yes, then plaintiffs will probably prevail. If the answer is no, then the de-fendants may prevail. The court will stand in recess.

I would ask that the parties do get together, see if they can get over some time this week after they have had a chance to review the discovery situation and ---

CHUCK FLYNN: Your Honor, could I ask--I've got to confess, I don't fully understand the ramifications to your ruling. Does that mean, for example, when we get to trial we're not going to be able to put on evidence regarding Mr. Rickett's actual lack of authority?

COURT: No, that's correct. The matter of Rickett's authority to enter into the contract he entered into has been established by summary judgment. The court accepting Terwilliger's testimony as the sole indication of the limitation finds that that limitation is consistent with the language used in the contract. When Rickett used the language "subject to owner committee approval", he in effect acknowledged the only evidence of limitation on authority that defendants have been able to come up with and that, in my opinion, resolved the issue.

FLYNN: But that told everyone that he didn't have the authority.

COURT: No, that's inconsistent with contract law. The statement, for example, the provision in a contract subject to approval of X does convey the idea that absent approval of X there is no contract, but it doesn't make the contract a -- it doesn't preclude the contract from existing. Nor does it say anything at all about the ability of the agent to enter into the contract given the approval of X.

FLYNN: If I stated, Mr. Page, Jim Singleton has agreed to sell you his car for $3,000, subject to his approval. That's a contact?

COURT: That would depend on the circumstances, but I -- if the other circumstances were such that you were my authorized agent to act and one could reasonably believe that, then it would seem to me that I wouldn't have put myself in that position of selling that car unless I could think of a good reason not to. The court will stand in recess.

End"